(4)

No. 93-788

Supreme Court, U.S
FILED
DEC 2 1993
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1993

DONALD E. FARRAR, et al.,
Petitioners,

VS.

FRANCHISE TAX BOARD,
Respondent.

On Petition For Writ Of Certiorari to the California Court of Appeal, First District

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ELIZABETH S. SALVESON*
RICHARD A. MARCANTONIO
HOWARD, RICE, NEMEROVSKI, CANADY,
ROBERTSON, FALK & RABKIN
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111
Telephone: (415) 434-1600
Attorneys for Petitioners

*Counsel of Record

BEST AVAILABLE COPY

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 362-2300

TABLE OF CONTENTS

	Page
A. Amended Section 19055 Is Preempted Because Its Purpose And Effect Are Inconsistent With The Federal Refund Remedy	2
B. No Independent, Adequate State Ground Insulates From This Court's Review The Refusal Of The Court Below To Find Section 19055 Preempted	7
CONCLUSION	9
APPENDIX:	
Public Service Bulletin	R-1
Murtagh v. County of Berks	R-5

TABLE OF AUTHORITIES

Cases

	Page
Barr v. City of Columbia, 378 U.S. 146 (1964)	8
Boughton Trucking Materials, Inc. v. County of Will, 229 Ill. App. 3d 576, 593 N.E.2d 1119 (Ill. App. 1992)	3
Brown v. Franchise Tax Board, 197 Cal. App. 3d 300, 242 Cal. Rptr. 810 (1987)	4, 5
Davis v. Wechsler, 263 U.S. 22 (1923)	8
Fair Assessment in Real Estate Association v. McNary, 454 U.S. 100 (1981)	3
Felder v. Casey, 487 U.S. 131 (1988)	1, 3, 4, 5, 7
Ford v. Georgia, 498 U.S. 411 (1991)	8
Harper v. Virginia Department of Taxation, ____ U.S. ____, 113 S. Ct. 2510 (1993)	3, 5, 7
McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18 (1990)	4, 9
Murtagh v. County of Berks, No. 34 M.D. Appeal Doc. 1992, 1993 Pa. LEXIS 283 (Pa., Nov. 10, 1993)	1, 2, 3, 4, 9
NAACP v. Alabama, 357 U.S. 449 (1958)	8
Nelson v. Regan, 731 F.2d 105 (2d Cir.), *cert. denied*, 469 U.S. 853 (1984)	4

TABLE OF AUTHORITIES

CASES

	Page
Staub v. City of Baxley, 355 U.S. 313 (1958)	2, 7
Ward v. Love County, 253 U.S. 17 (1920)	8
Woosley v. California, 3 Cal. 4th 758, 838 P.2d 758, 13 Cal. Rptr. 2d 30 (1992), *cert. denied*, ____ U.S. ____, 113 S. Ct. 2416 (1993)	8

Statutes and Regulations

31 U.S.C. § 3124(a)	4
42 U.S.C. § 1983	4
CAL. REV. & TAX. CODE § 19055	*passim*

Other Authorities

16 C. Wright, A. Miller, E. Cooper & E. Gressman, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 4021 at 676 (1977)	7
Justice O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 5-6 (1984)	7

No. 93-788

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

DONALD E. FARRAR, et al.,
Petitioners,

VS.

FRANCHISE TAX BOARD,
Respondent.

On Petition For Writ Of Certiorari to the California Court of Appeal, First District

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The force of the case for certiorari is not diminished by the arguments of Respondent Franchise Tax Board ("the Board"). Rather, the need for this Court's review has only grown more apparent since the Petition was filed: the Pennsylvania Supreme Court, following *Felder v. Casey*, 487 U.S. 131 (1988), has now held state procedural barriers preempted as applied to a class action for the refund of an unconstitutional tax. *Murtagh v. County of Berks*, No. 34 M.D. Appeal Doc. 1992, 1993 Pa. LEXIS 283 (Pa., Nov. 10, 1993) (reproduced in Reply App. at R-5).[1] The conflict among the state courts on *Felder* preemption of procedural conditions on the refund of unconstitutional state taxes makes action in this Court more urgent than before.

[1]Petitioners first learned of the *Murtagh* decision well after the November 12 filing of the Petition.

The case for certiorari was already strong enough before *Murtagh*. The Petition asks this Court to decide whether California offended the Supremacy Clause when it imposed a procedural condition that protected its own fisc by failing to redress the injury that California's unlawful tax inflicted on the market for United States obligations. Not even the Board contests the importance of this question. Indeed, it does not deny (1) that California's unlawful tax depressed the market for federal obligations; (2) that California is obliged to redress that market injury; (3) that a market-wide tax refund is the only remedy that is sufficient to redress that market injury,[2] and is the remedy that federal law requires; and (4) that California may not evade this federal remedy on the basis of its own contrary fiscal interests.

Instead, with scarcely a reference to the United States Constitution or its Supremacy Clause, the Board offers essentially two rejoinders. First, it attempts to take issue with petitioners' statement of the undisputed facts; and then it purports to discover an independent and adequate state-law ground in the decision below. Neither rejoinder succeeds, and neither justifies denying certiorari. For the reasons given in the Petition, and to resolve the conflict between the decision below and *Murtagh*, this Court should grant certiorari on the question of whether Section 19055's "arid ritual of meaningless form" (*Staub v. City of Baxley*, 355 U.S. 313, 320 (1958)) is preempted.

A. Amended Section 19055 Is Preempted Because Its Purpose And Effect Are Inconsistent With The Federal Refund Remedy.

The record is clear that California amended Section 19055 for the *purpose* of protecting its fisc at the expense of paramount federal fiscal interests (*see* Pet. at 9), and that amended Section 19055 had precisely the intended *effect*. Where a State imposes a notice-of-claim and exhaustion requirement that "conflicts in both its purpose and effects with [federal] remedial

---

[2]Ironically, the Board assigns blame for the absence of an adequate market remedy not to California's prohibitive procedural hurdle, but to the investors who, predictably, found it insurmountable. Resp. Br. 14.

objectives," that requirement is preempted. *Felder*, 487 U.S. at 138. *See* Pet. at 18-19. The Board argues that *Felder* preemption does not extend to tax cases. Resp. Br. at 15.[3] But it ignores this Court's emphatic ruling in *Harper v. Virginia Department of Taxation*, ___ U.S. ___, 113 S. Ct. 2510 (1993), that the fiscal interests of the offending State may not serve as a ground for denying tax refunds that federal law prescribes. Pet. at 14-15.

Since *Harper* was decided, the Pennsylvania Supreme Court has expressly repudiated the Board's premise by applying *Felder* preemption to a tax-refund case.[4] *Murtagh*, a Section 1983 class action brought to challenge Pennsylvania's discriminatory "Welcome Stranger" real property tax assessment policy on equal-protection grounds (App. R-5, R-6), presented the question whether plaintiffs' failure to exhaust state remedies was a sufficient ground for dismissing that class action. App. R-7.[5] The Pennsylvania Supreme Court held that it was not, and relied on *Felder*'s refusal to allow "procedure[s] that place[] conditions on the vindication of a federal right in state court." App. R-12, R-14.[6] The court found the case for preemption, in one respect, even stronger than that in *Felder*, for state *tax* remedies typically

---

[3]Citations are to the Board's revised brief, which contains the correct docket number.

[4]Before *Harper*, the state courts had refused to do so. *E.g. Boughton Trucking Materials, Inc. v. County of Will*, 229 Ill. App. 3d 576, 579, 593 N.E.2d 1119, 1121 (Ill. App. 1992). *See also* cases cited in Pet. at 19 n.25.

[5]The class representatives had exhausted their administrative, but not judicial, remedies under state law; the unnamed class members, of course, had exhausted no state-law remedy. App. at R-5, R-15. The court left open the question whether an individual plaintiff, as opposed to a class, would be similarly excused from exhausting state remedies. App. at R-16 n.16.

[6]Finding an "apparent conflict" between *Felder* and *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981), and noting the lack of "direction from the United States Supreme Court on this issue," the *Murtagh* court concluded that *Felder* governed the preemption question. App. at R-9, R-14. The state courts that had faced this

result in "additional expense and delay . . . without according the taxpayers the relief sought." App. R-14, R-15.

Petitioners, while they do not proceed under Section 1983, pray for the "uniquely federal remedy" (*Felder*, 487 U.S. at 141) that arises under the tax immunity statute, 31 U.S.C. Section 3124(a).[7] California's notice-of-claim requirement "undermines" that federal remedy (487 U.S. at 141; *see* Pet. at 10-13); it is therefore preempted, unless, as the Board claims (Resp. Br. at 15), *Felder* preemption does not extend to tax cases. *Murtagh*'s conclusion that *Felder does* govern tax cases is in clear conflict with the decision below.

The Board attempts to justify the decision below on the ground that exhaustion requirements are particularly important in tax-refund cases. Resp. Br. at 16.[8] But it is unable to explain the need to prohibit a class representative from exhausting administrative remedies on behalf of a class, as was done both in *Brown v. Franchise Tax Board*, 197 Cal. App. 3d 300, 242 Cal. Rptr. 810 (1987) (*see* Pet. at 3-6), and in *Murtagh*. App. R-5. The *Murtagh* court specifically rejected the argument that the pre-

---

conflict before *Harper* (*see* note 4, *supra*) had treated *Fair Assessment* as controlling. *See* Pet. at 19 & n.25.

[7]The Board is unpersuasive in contending that the remedy sought here is somehow less "uniquely federal" than that in *Felder*. *See* Resp. Br. at 16. Having collected a tax which was altogether "beyond [its] power to impose," federal remedial principles leave California "no choice" but to " 'undo' the unlawful deprivation by refunding the tax." *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 39 (1990). A full refund is the only remedy consistent with 31 U.S.C. § 3124(a) and with the Federal Government's interest in protecting its financial markets from depredations by the States. *See* Pet. at 10.

[8]The Board's reliance on *federal* tax law (Resp. Br. at 17-18) is misplaced, as the command of the Supremacy Clause does not reach federal law. In any event, the Board cites no authority that holds that an individual may not file a claim for a federal tax refund on behalf of a class, and ignores at least one case in which a court entertained a class action relating to the disposition of federal tax refunds despite the failure to file *any* claim. *Nelson v. Regan*, 731 F.2d 105, 109 (2d Cir.), *cert. denied*, 469 U.S. 853 (1984).

emption of state remedies would "disrupt state and local tax administration," observing that class-action constitutional challenges "probably will, in the long run, significantly reduce the inconvenience, inefficiency, delay and expense involved in countless individual lawsuits over the same issue . . . ." App. R-15, R-16.

The Board, finally, attempts to escape the application of *Felder* and *Harper* by claiming that petitioners "misstate[d] the record in asserting that the Board actively deterred taxpayers from filing individual claims for refund." Resp. Br. at 5. It pegs its claim of misstatement primarily on the contention that the portion of its internal bulletin quoted in the Petition[9] "referred to the recommended response that Board employees should give to taxpayers inquiring about their claims for refunds already pending before the Board," and *not* to "potential claims for refund which had not yet been filed"—claims, that is, for tax year 1982 and later. Resp. Br. at 5. The bulletin itself, however, decisively refutes this contention. The quoted language falls under the general heading "What to Tell the Taxpayer," and follows immediately after the legend "Questions pertaining to *tax year 1982 or subsequent.*" App. R-3 (emphasis added).

No more correct is the Board's claim that the Petition misstated the record in regard to the legislative history of amended Section 19055. The record, says the Board, discloses no intent to "thwart class relief for tax refunds" (Resp. Br. at 6), nor any purpose of denying market relief to the United States. Resp. Br. at 12. Notably, the Board does not dispute that the *effect* of the

---

[9]"Tell the Taxpayer 'the issue you raise is currently before the Superior Court in the class action suit *Brown et al. v. Franchise Tax Board.* Action on claims for refund raising this issue is being deferred until the case is decided and all appeals are exhausted. A considerable period of time could elapse before this occurs, and your patience in this matter is appreciated.' "

Pet. at 4. App. at R-3. This portion of the bulletin is not reproduced in the Board's incomplete appendix. Resp. Br., App. B. Petitioners have reproduced its entire text in the appendix below.

amendment was to accomplish both results; and the *purpose* of the amended statute is no more in dispute than its effect.

The amended statute's purpose was to reduce the administrative cost of the refund remedy federal law requires. This the Board admits: it says it propounded the amendment in response to its "expenditure of substantial administrative costs in administering the *Brown* class action" (Resp. Br. at 8);[10] and it continues to plead that it is not "fiscally prepared to administer class relief." Resp. Br. at 12.[11] If this were not enough, the Board takes the position that everyone who requests a refund is subject to "the potential burdens" of an audit of his or her tax returns. Resp. Br. at 12. By singling out for an audit those taxpayers who seek the refund of an unconstitutional tax on federal obligations, the State further demonstrates its intent to burden the federal refund remedy. There is no question but that Section 19055 was amended for the purpose of vindicating the fiscal interests of the State, and that the State accomplished this by means inconsistent with paramount federal fiscal interests. *See* Pet. at 9. Under

---

[10]Contrary to the Board's assertion, the Court of Appeal made no factual finding that the Board "incurred . . . more than $1 million" in administering the *Brown* class action. *See* Resp. Br. at 6. Nor does the Board's brief say how much of that purported $1 million expense was attributable to administrative steps that it is not required to take whenever it issues a refund. See Pet. at 17 & n.23. In fact, the record below contains no evidence that the administrative cost to the State per dollar of refund is likely to be any less when every member of a class of taxpayers complies with Section 19055 than when none do.

[11]The Board now adds that the purpose of the amendment was to provide an "administrative mechanism" to identify potential class members. Resp. Br. at 12. The amended statute, however, neither provides a procedure by which the agency will identify class members (e.g., out of its computer data base) nor addresses the allocation of the cost of identifying class members (e.g., out of the common fund). Instead, the purported "administrative mechanism" is to throw the entire administrative burden of identifying the members of a class on to an individual taxpayer as a precondition of even filing a class claim. Of course, the need to identify class members at the administrative level does not even arise until liability is conceded.

Felder and *Harper*, application of Section 19055's requirements to this action is preempted.

B. No Independent, Adequate State Ground Insulates From This Court's Review The Refusal Of The Court Below To Find Section 19055 Preempted.

The remainder of the Board's effort is devoted to challenging this Court's jurisdiction. It argues, in effect, that the lower court's ruling that petitioners failed to comply with the preempted state statute is an independent and adequate state ground of decision. The Board misapprehends the doctrine on which it relies. If a state court decision "upholds a particular state action on the ground that it offends neither federal nor state law, then the Supreme Court has power to review the state court judgment" on the federal question. Justice O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 5-6 (1984). That is what happened here. The court below held that (1) petitioners had not complied with Section 19055, and (2) federal law did not preempt the application of Section 19055 to this action. While its first holding is not subject to review in this Court, the second, federal ground surely is.

Put differently, a state ground is not adequate unless the state court could render the same judgment after reversal by this Court on the federal ground. Here, class certification was denied solely for noncompliance with Section 19055. If Section 19055's prohibitive requirements are preempted by federal law, as petitioners contend, that state ground cannot support the state court's conclusion. *See, e.g., Staub,* 355 U.S. at 319 (failure to secure unconstitutional license not an adequate state ground). In short, it is "always a federal question whether federal law has . . . superseded state law . . . ." 16 C. Wright, A. Miller, E. Cooper & E. Gressman, FEDERAL PRACTICE & PROCEDURE: JURISDICTION Section 4021 at 676 (1977).

Indeed, petitioners' failure to comply with Section 19055's "arid ritual of meaningless form" (*Staub*, 355 U.S. at 320) is not even a *tenable* state ground. This Court has held untenable those state grounds that are conveniently manufactured for the occasion:

> " 'Novelty in [state] procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.' " (*Ford v. Georgia*, 498 U.S. 411, 423 (1991) (quoting *NAACP v. Alabama*, 357 U.S. 449, 457-58 (1958)))[12]

Here, the Board admits it proposed the amendment to Section 19055 in direct response to a lawsuit that forced it to pay refunds of the very tax here at issue.

The Board relies on *Woosley v. California*, 3 Cal. 4th 758, 838 P.2d 758, 13 Cal. Rptr. 2d 30 (1992), *cert. denied*, — U.S. —, 113 S. Ct. 2416 (1993), for the proposition that California provided no class-refund remedy until Section 19055 was amended. As demonstrated in the Petition, however, California courts had recognized such a remedy since well before the collection of the tax here at issue. Pet. at 21 n.27.[13] *Woosley* merely overruled previously-settled law; by no means did it, nor could it, erase the historical fact that, at the time the tax here at issue was collected, and the refunds applied for, an unbroken

---

[12]*See also Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) (rejecting state procedural requirements which are not strictly or regularly followed"); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) ("the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice"); *Ward v. Love County*, 253 U.S. 17, 22 (1920). The state court in *Ward* had refused to refund a tax levied on tribal property. Challenging this Court's jurisdiction, the respondent contended that the judgment rested on independent and adequate state grounds, namely, the state court's conclusion that no statute authorized the refunds. This Court reversed, stating that "non-Federal grounds of decision that were without any fair or substantial support" did not divest it of its authority to vindicate the federal right to the refund of the unlawful tax. 253 U.S. at 22.

[13]At no time during the course of the *Brown* litigation did the State object that California law did not permit a class-claim for tax refund. Indeed, the State "consider[ed] the question [of the availability of class claims] to be settled" until the *Woosley* court, *sua sponte*, raised the issue in 1992. 3 Cal. 4th at 788.

series of appellate decisions in California upheld an unrestricted class remedy for the refund of unlawful taxes.[14]

CONCLUSION

For the reasons expressed in this Reply and in the Petition, we respectfully urge the Court to grant certiorari. This Court's action is especially urgent in light of the conflict of the decision below with the Pennsylvania Supreme Court's recent decision in *Murtagh*.

DATED: December 22, 1993

Respectfully,

ELIZABETH S. SALVESON*
RICHARD A. MARCANTONIO
HOWARD, RICE, NEMEROVSKI,
CANADY, ROBERTSON, FALK & RABKIN
A Professional Corporation

Attorneys for Petitioners

* Counsel of Record

---

[14]As noted in the Petition, the "novelty" of the challenged procedure also runs afoul of this Court's specific command that only a tax-refund procedure which "was in effect at the time of the tax payments" may bar a refund claim. *McKesson*, 496 U.S. at 24 n.4. *See* Pet. at 20-21. The Board ignores that command. Resp. Br. at 11 n.3. Nor does *McKesson* offer the Board comfort in any other respect (*cf.* Resp. Br. at 10-11), for that case neither raised nor addressed the requirements of the Supremacy Clause where an unlawful state tax injures the Federal Government's capital market.

February 7, 1985

PUBLIC SERVICE BULLETIN NO. 85-2

READ IMMEDIATELY

BENHAM CORP/CAPITAL PRESERVATION CLASS ACTION SUIT

PURPOSE OF BULLETIN

To provide information on the Benham Corporation class action suit (Brown, et. al., v. FTB; SP#803759) and define public service procedures for handling contacts relating to this matter.

BACKGROUND

The Franchise Tax Board is involved in a class action suit which challenges the taxability of distributions (dividends or benefits) received from several funds administered by the Benham Corporation. The suit contends that since the three funds (Capital Preservation Fund, Capital Preservation Fund II, and Capital Preservation Note Trust) derived their income exclusively from United Status Treasury debt securities, the distribution of the income should not have been taxed.

- In March 1984, the Superior Court decided the issue in favor of the class of taxpayer/investors for the TYS 1978-1981.
- The Superior Court has ordered FTB to issue notification and tax refund claim forms to the class of taxpayer/investors for the TYS 1979-1981. The purpose of the notice is to
  - inform the investors of the class action suit and the amount of refund they may be entitled to receive.
  - provide a claim form on which they may elect to be included in the plaintiff class and, if appropriate, challenge the refund calculated by FTB.
- The case is not yet closed, and a considerable period of time could elapse before all appeals are exhausted.

WHAT FTB IS DOING	The "Tax Refund Claim Form" and Notice of Plaintiff Class Action Determination" (see copies attached) are being sent to all identified investors. • Approximately 11,000 notices were mailed on February 6, 1985 with a taxpayer response by April 1, 1985. • An estimated 80,000 additional notices will be mailed April 30, 1985 with a taxpayer response date of July 1, 1985.
RESPONSIBILITIES	The Document Resolution Section is responsible for reviewing the returns and completing the information on the claim form. That unit will also handle the returned claim forms and any correspondence, amending returns or other information pertaining to this court case.
IMPORTANT!! NOTE	Because the taxpayer's legal rights as members of the plaintiff class could not be involved, public service personnel should *not* attempt to explain the notices or claim forms or to advise the taxpayer about what to do, except as authorized below under "What to tell the taxpayer."
WHAT TO TELL THE TAXPAYER	All communications are to be in writing. The procedures which follow are to assure that inquiries are handled uniformly and information gets to the correct unit.

WHAT TO TELL TAXPAYER (continued)	If the taxpayer has . . .	Then . . .
	Received claim forms and notice, asks questions regarding tax years 1978-1981.	Instruct the taxpayer to write all questions and mail them to the address on the claim form, which is: Franchise Tax Board Attn: Document Resolution 53, Sacramento, CA 95840-0068.
	NOT received a claim form and notice and questions regarding tax years 1978-1981.	• Ask the taxpayer the following . . . - Taxpayers Account No. - Taxpayer's Full Name - Tax payer's Current Address - Year(s) in Question • and - District Office—refer the information to District Office Liaison Unit in the Information Center Section. - Central Office—refer the information to Document Resolution Section, Attn: Jackie Lewis.
	Questions pertaining to tax year 1982 or subsequent	Tell the Taxpayer "the issue you raise is currently before the Superior Court in the class action suit *Brown et. al., v. Franchise Tax Board.* Action on claims for refund raising this issue is being deferred until the case is decided and all appeals are exhausted. A considerable period of time could elapse before this occurs, and your patience in this matter is appreciated."

AMENDED RETURNS

Amended returns which mention the Capital Preservation Funds, or trust, the Benham Corporation and/or the court case [Brown et. al., v. FTB) as the basis of the adjustment will be processed by the Exceptions Unit, Document Resolution Section as follows:

Returns for tax years 1978, 1979, 1980 and 1981.	Route to Document Resolution Attn: Jackie Lewis after posting in the Withholding System. These will be processed when the case is resolved.
Returns for tax years 1982 and subsequent.	Issue ATS letter X125 (attached). ATS will route returns to Cher Woehl, administrative services bureau. These returns will be held until the issue is finally decided by the courts.

QUESTION

If you have any questions regarding this bulletin on the Benham Case, please contact Cher Woehl Administrative Services Bureau at 355-0431 or (ATSS 438-0431).

/s/
Director, Taxpayer Services Bureau

MERRY J. MURTAGH, SPENCER LEE CHERASHORE, FREDERICK MURTAGH et al.,
Appellants
v.
COUNTY OF BERKS, et al.,
Appellees
No. 34 M.D. Appeal Docket 1992

SUPREME COURT OF PENNSYLVANIA

March 8, 1993, ARGUED

November 10, 1993, DECIDED

MR. JUSTICE FLAHERTY

Merry J. Murtagh and other taxpayers appeal an order of Commonwealth Court reversing an order of the Court of Common Pleas of Berks County and remanding with instructions to dismiss the action for lack of subject matter jurisdiction. The trial court had concluded that it had subject matter jurisdiction over a class action brought by the taxpayers against the County of Berks and other local government units under 42 U.S.C. § 1983[1] challenging the constitutionality of the manner in which property is assessed for real estate tax purposes.

The taxpayers, representing a class of recent purchasers of real estate in Berks County, filed an amended complaint, after exhausting state administrative remedies, against the local governments.[2] They asserted that the local governments had adopted a

---

[1]42 U.S.C. § 1983 (1988) creates a remedy for violations of federal rights committed by persons acting under color of state law. Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2]The taxpayers originally sued the County of Berks, the Berks County Board for the Assessment and Revision of Taxes and the Berks County

discriminatory "Welcome Stranger" policy. This policy results in the reassessment of recently purchased realty based on the purchase price while making no modifications in the assessment of comparable property not recently sold.[3] The taxpayers alleged that this practice violated their equal protection rights under the Fourteenth Amendment and, because the reassessments were done under color of state law, constituted a violation of 42 U.S.C. 1983.[4]

The local government defendants filed preliminary objections to the amended complaint based on, among other things, a lack of

---

Board of Assessment Appeals. The county and the board filed a number of preliminary objections to taxpayers' complaint. The trial court sustained only one of the objections finding that taxpayers had failed to sue the taxing authorities which were indispensable parties. As a result, taxpayers filed an amended complaint joining all taxing authorities in the county, nearly 100 cities, boroughs, townships and school districts, herein referred to as the local governments.

[3]The Constitution and statutes of the Commonwealth embody a system of taxation that requires property to be taxed at a uniform rate according to its estimated actual market value. *See* Pa. Const. art. VIII, § 1; 72 Pa.C.S. § 5020-101 et seq. and § 5342 et seq.

The Commonwealth Court recently invalidated a county tax assessment scheme where it found that the county violated the uniformity requirement of the state Constitution and equalization requirement of the statute governing assessments by third-class counties. See *City of Lancaster v. County of Lancaster*, 143 Pa. Cmwlth. 476, 599 A.2d 289 (1991).

[4]The substance of the taxpayers' complaint is that the "Welcome Stranger" policy of Berks County causes de facto discrimination and violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Taxpayers cite, as authority for their claim, *Allegheny Pittsburgh Coal Co. v. Commissioner of Webster County*, 488 U.S. 336, 1095 S. Ct. 633, 102 L.Ed. 2d 688 (1989). There, the Supreme Court held that the de facto discrimination engendered by a "Welcome Stranger" policy in a "current value" taxation system violated said Equal Protection Clause. *See also Nordlinger v. Hahn*, U.S., 112 S. Ct. 2326, 120 L.Ed. 2d 1 (1992).

Given the procedural posture of this case, it is inappropriate to comment on the merits of the taxpayers' case.

subject matter jurisdiction. The trial court dismissed both sets of preliminary objections, and certified the issue for appeal pursuant to Pa.R.A.P. 1311(b). Commonwealth Court granted separate petitions for permission to appeal the order, consolidated the appeals, and reversed.

The question presented is whether state courts must entertain Section 1983 class actions challenging the constitutionality of a county's tax assessment procedure where plaintiffs have not exhausted state administrative and judicial remedies. The local governments contend that the trial court does not have subject matter jurisdiction over such a Section 1983 action, arguing that state courts should follow the direction of the federal courts and refrain from entertaining such suits where there are plain, adequate and complete state administrative and judicial remedies.[5]

---

[5]The local governments further argue that some state courts have refrained from entertaining such suits. *See, e.g., Bach v. Chilivus*, 236 Ga. 500, 224 S.E. 2d 370 (1976). Since these cases pre-date important Supreme Court cases discussed infra, we do not find them probative of the issue presented.

Courts that do require their courts to hear Section 1983 actions before exhaustion of state statutory remedies include Mississippi and New Jersey. *Burrell v. Mississippi State Tax Commission*, 536 So. 2d 848 (Miss. 1988) and *Bung's Bar & Grille, Inc. v. Florence Township*, 206 N.J.Super. 432, 502 A.2d 1198 (1985). In *Burrell*, the court held that state courts must hear taxpayers' actions brought pursuant to Section 1983, because they have concurrent jurisdiction with the federal courts, because the Supremacy Clause of the United States Constitution requires that state courts enforce the valid enactments of Congress, of which Section 1983 is one, and because the principle of comity did not apply to state courts. In *Bung's Bar*, the Superior Court held that the state courts must entertain Section 1983 actions, since New Jersey law demands that all issues of a controversy be included at the same time in a lawsuit and the available administrative remedy did not allow for civil rights claims. Neither court addressed the exhaustion of remedies argument.

See also Nutbrown v. Munn, 311 Ore. 328, 811 P.2d 131 (1990); *Hogan v. Musolf*, 163 Wis. 2d 1, 471 N.W.2d 216 (Wisc. 1991), and *L.L. Bean Inc. v. Bracey*, 817 S.W.2d 292 (Tenn. 1991). In these cases, Section 1983 actions were entertained by state courts.

Federal courts have routinely refrained from interfering with the administration of state taxes due to the Tax Injunction Act, 28 U.S.C. Section 1341, and principles of comity. In *Fair Assessment In Real Estate v. McNary*, 454 U.S. 100, 102 S. Ct. 177, 70 L.Ed. 2d 271 (1981), the Supreme Court of the United States ruled that actions for injunctive relief and monetary damages from a state property assessment procedure are barred in the federal courts by the principle of comity. That court said that comity concerns motivated congress to pass the Tax Injunction Act which prohibits a district court from enjoining, suspending or restraining the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.[6] 454 U.S. at 103, 102 S. Ct. at 179, 70 L.Ed. 2d at 275. By enacting that statute, congress recognized that the autonomy and fiscal stability of states survive best when their tax systems are not subject to scrutiny in federal courts. 454 U.S. at 102-03, 102 S. Ct. at 179, 70 L.Ed. 2d at 275. The Supreme Court of the United States also ruled that a similar action for monetary damages is likewise barred as long as the state provides for plain, adequate and complete remedies, because such actions are just as intrusive to the states' revenue collection systems as the actions for injunctive relief specifically under the Tax Injunction Act 454 U.S. at 114-15, 102 S. Ct. at 185, 70 L.Ed. 2d at 282. The court then stated that such taxpayers are to seek protection of their federal rights by state remedies provided that those remedies are plain, adequate, and complete and may ultimately seek review of the state decisions in the Supreme Court of the United States. 454 U.S. at 116, 102 S. Ct. at 186, 70 L.Ed. 2d at 283.[7]

---

[6]The Tax Injunction Act of 1937, 28 U.S.C. § 1341, provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

[7]The Court discerned no significant difference between remedies which are "plain, adequate, and complete" as the phrase is used to articulate the doctrine of equitable constraint under comity and those that are "plain, speedy and efficient," within the meaning of the Tax

State courts are not bound by *Fair Assessment* and its progeny. The Tax Injunction Act applies by its very terms to preclude federal courts, not state courts, from enjoining state tax schemes. Therefore, there is no danger of federal court interference or misunderstanding. Likewise, abstention based on comity has no application when a Section 1983 cause of action is brought in state courts because there is no risk of federal court interference.[8]

The local governments nonetheless argue that the state courts should abstain from hearing Section 1983 claims until the taxpayers have exhausted state administrative and judicial remedies. They appear to argue that Section 1983 plaintiffs in state court should be no better off than Section 1983 plaintiffs in federal court. Therefore, they should be required to exhaust the administrative and judicial remedies set forth in the Third Class County Assessment Law (TCCAL)[9] and in the General County Assess-

---

Injunction Act. *Fair Assessment*, 454 U.S. at 116 n.8, 102 S. Ct. at 186 n.8, 70 L.Ed. 2d at 283 n.8.

[8]On the other hand, the federal courts have followed Fair Assessment in cases similar to the Taxpayers' case. e.g., *Sunderland Properties, Inc. v. County of Berks*, 750 F. Supp. 704 (E.D. Pa. 1990). There, a challenge to the county's "Welcome Strangers" policy was dismissed by the court based upon comity and the Tax Injunction Act of 1937, 28 U.S.C. § 1341.

[9]Act of June 26, 1931, P.L. 1379, as amended, 72 P.S. §§ 5342-5350. This act does not have an official name but is commonly referred to as the Third Class County Assessment Law.

The Third Class County Assessment Law creates a three-member board of assessment appeals (board) in each county. Aggrieved taxpayers appeal to the board and then to the county common pleas court. The board must cause annual assessment of property within its jurisdiction. Section 1 and 3 of the TCCAL; 72 P.S. §§ 5342,5344. Property owners subject to these assessments must be duly notified. Section 8(b) of the TCCAL; 72 P.C § 5349(b). A property owner who is aggrieved by any assessment, whether or not the assessment has been changed from the previous year, has a right to appeal to the board for relief. Section 8(c) of the TCCAL; 72 P.S. § 5349(c). When such an appeal has been filed, the board must notify each person and each taxing district which has an interest and has the power to compel the attendance of witnesses and the

ment Law (GCAL).[10] Under both schemes, a property owner who is aggrieved by any property tax assessment has a right to appeal to a board of assessment appeals, and then to the court of common pleas which is to proceed de novo. In light of the resolution of this case, we need not and do not decide here whether the state statutory remedies are plain, adequate and complete in the context of a Section 1983 class action.[11]

---

furnishing of documents. Section 8(d) of the TCCAL; 72 P.S. § 5349(d).

Section 9 of the Third Class County Assessment Law further provides that the aggrieved property owner may appeal the final decision of the board to the county court of common pleas. 72 P.S. § 5350. The court of common pleas will proceed de novo. *Appeal of U.S. Steel Corp.*, 436 Pa. 435, 260 A.2d 779 (1970).

[10]Act of May 22, 1933, P.L. 853 as amended, 72 P.S. §§ 5020-601 - 5020-602.

The General County Assessment Law applies to *Berks County*, where it is not inconsistent with the Third Class County Assessment Act. Art. 1, § 105 of the GCAL; 72 P.S. § 5020-105. *Truck Terminal Motels of America, Inc. v. Berg County Board of Assessment Appeals*, 127 Pa. Cmwlth. 408, 561 A.2d 1305 (1989), petition for allowance of appeal denied, 525 Pa. 652, 581 A.2d 576 (1990). It has a procedural remedy similar to that of the Third Class County Assessment Act. The General County Assessment Law provides that the board in each county shall bear property owners' appeals of tax assessments. Art. V, § 511 of the GCAL; 72 P.S. § 5020-511. The decision of the board can then be appealed to a court of common pleas for a de novo proceeding, with further appeals to the Superior and Supreme Courts. Art. V, 518.1, 518.2, and 519 of the GCAL; 72 P.S. §§ 5020-518.1-2, 5020-519.

[11]Taxpayers contend that the state remedies are not plain, adequate and complete because they are precluded from seeking an award of attorneys' fees via the fee shifting policy embodied in ##1983 and 1988. We need not address this issue in light of the resolution of this case.

It is noted that the federal courts in Pennsylvania have consistently ruled that both of these laws provide a taxpayer a plain, adequate, and complete remedy. *See, e.g., Garrett v. Lamford*, 582 F.2d 810 (3d Cir. 1978). The Garrett court held that the district court properly abstained from entertaining a Section 1983 class action challenging alleged discriminatory property tax assessments brought by property owners in Berks County. The court held that the class action was precluded in

The Supreme Court of the United States has consistently affirmed the duty of state courts to entertain Section 1983 actions, except where a valid excuse exists, regardless of whether plaintiffs have exhausted state administrative and judicial remedies. Municipalities may be sued under Section 1983 when a municipal policy, ordinance, regulation or custom inflicts constitutional injury. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed. 2d 611 (1978). Since 1980, the Supreme Court of the United States has made clear that state courts have concurrent jurisdiction with federal courts to hear Section 1983 claims. *Maine v. Thibout*, 448 U.S. 1, 100 S. Ct. 2502, 65 L.Ed. 2d 555 (1980). When state courts entertain federal causes of action, the rights of, and the defenses to, a federal cause of action are defined by federal law so that the outcome of federal causes of action would be the same, regardless if decided in a state or federal forum. *Howlett v. Rose,* 496 U.S. 356, 375, 110 S. Ct. 2430, 2442, 110 L.Ed. 2d, 332, 353 (1990).[12] Also, in the absence of a valid excuse, state courts have no discretion to decline to accept jurisdiction when the parties and

---

federal court under the Tax Injunction Act, since the Third Class County Assessment Law, affording administrative appeal with judicial review to a class, provided them with a plain, speedy and efficient remedy. *Id.* at 819.

Garrett predated significant Supreme Court rulings in section 1983 litigation and did not address the attorneys' fees issue. Therefore, it would have little probative value to this case were we to address the issue of whether the state remedies are plain, adequate and complete.

[12]The Court in Howlett reaffirmed that federal law is enforceable in state courts because the Constitution and laws passed pursuant to it are as much laws in the states as laws passed by the state legislature. 496 U.S. at 367, 110 S. Ct. at 2438, 110 L.Ed. 2d at 347. The Court held that a state law sovereign immunity defense is not available to a school board in a section 1983 action brought in a state court that otherwise has jurisdiction when such a defense would not be available if the action were brought in a federal forum. 496 U.S. at 361-83, 110 S. Ct. at 2434-47, 110 L.Ed. 2d at 343-58.

controversy are properly before the state court. 496 U.S. at 369, 110 S. Ct. at 2439, 110 L.Ed. 2d at 348.

A valid excuse may exist when a state court refuses jurisdiction because it has no competent court to hear the case or because of a neutral state rule of judicial administration, unless that rule is preempted by federal law. *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L.Ed. 2d 123 (1988). The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the state create a court competent to hear the case in which the federal claim is presented. *Howlett*, 496 U.S. at 372, 110 S. Ct. at 2441, 110 L.Ed. 2d at 350-351. Neutral rules of judicial administration have included those authorizing dismissal of both federal and state claims where neither the plaintiff nor the defendant was a resident of the forum state, *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377, 49 S. Ct. 355, 73 L.Ed. 747 (1929), where the cause of action arose outside of the court's territorial jurisdiction, *Herb v. Pitcairn*, 324 U.S. 117, 65 S. Ct. 459, 89 L.Ed. 789 (1945), or where the doctrine of forum non conveniens appropriately applied. *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 71 S. Ct. 1, 95 L.Ed. 3 (1950).

Neutral state rules of judicial administration appear to be preempted in Section 1983 cases, however, in situations where the plaintiff and defendant are residents of the forum state and the cause of action arises in the forum state. The Supreme Court of the United States has ruled that Section 1983 plaintiffs are not required to exhaust state administrative remedies before instituting Section 1983 suits in federal courts or state courts. *See Patsey v. Board of Regents of Florida*, 457 U.S. 496, 102 S. Ct. 2557, 73 L.Ed. 2d 172 (1982) and *Feller v. Carey*, supra, respectively. In Felder, nine months after being allegedly beaten by Milwaukee police officers who arrested Felder on a disorderly conduct charge that was later dropped, Felder filed a state court action against the city and certain of the officers under Section 1983. He alleged that the beating and arrest were racially motivated and violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution. The officers moved to dismiss the suit because of Felder's failure to comply with Wisconsin's notice-of-

claim statute. The statute provided, in part, that: before suit may be brought in state court against a state or local governmental entity or officer, the plaintiff, within 120 days of the alleged injury, must notify the defendant of the circumstances and amount of the claim and the plaintiffs intent to hold the named defendant liable; the defendant then had 120 days to grant or disallow the requested relief; and the plaintiff must bring suit within six months of receiving notice of disallowance. 487 U.S. at 134-37, 108 S. Ct. at 2305-06, 101 L.Ed. 2d at 135-37.

The Felder Court held that when a Section 1983 action is brought in the state court, Wisconsin's notice-of-claim statute conflicted in both its purpose and effect with Section 1983's remedial objectives and was preempted pursuant to the Supremacy Clause. The court explained that while states retain the authority to prescribe the rules and procedures governing suits in their courts, that authority does not permit states to place conditions on the vindication of a federal right. Rather, congress meant to provide individuals immediate access to the federal courts and did not contemplate that those who sought to vindicate their federal rights in state courts could be required to seek redress in the first instance from the state officials whose hostility to those rights precipitated their injuries. 487 U.S. at 147-53, 108 S. Ct. at 2311-14, 101 L.Ed. 2d at 143-47.

The Felder court found no merit to the claim that the exhaustion requirement imposed by the state statute is essentially de minimis because the statutory settlement period entailed none of the additional expense or undue delay typically associated with administrative remedies, the statutory scheme did not eliminate a claimant's right to seek full compensation through suit or the statutory scheme was designed to sift out specious claims. That court emphasized that Section 1983 actions "belong in court" and exist independent of any other legal or administrative relief that may be available as a matter of federal or state law except where congress has expressly imposed an exhaustion requirement.[13] The

[13]Congress did establish an exhaustion requirement for a specific class of section 1983 actions, those brought by adult prisoners challenging the conditions of their confinement, in the Civil Rights of Institutionalized

court said that any scheme designed to sift out "specious claims" from the stream of complaints that can inundate local governments in the absence of sovereign immunity is "manifestly inconsistent" with the central objective of the civil rights statutes. 487 U.S. at 148-50, 108 S. Ct. at 2312-13, 101 L.Ed. 2d at 144-45.

We now address the critical question of whether the common pleas courts of this Commonwealth must entertain Section 1983 cases without requiring the exhaustion of state administrative and judicial remedies. We do not have direction from the United States Supreme Court on this issue; rather, we have competing lines of cases and are asked to resolve the apparent conflict.

One may argue that, according to U.S. Supreme Court precedent, the taxpayers should be no better off in state court than they are in federal court with regard to a Section 1983 case challenging the constitutionality of a property tax assessment procedure. According to Fair Assessment and its progeny, plaintiffs must exhaust state administrative and judicial remedies in a property tax assessment case before bringing a Section 1983 action in federal court. Therefore, the argument continues, the taxpayers must also exhaust state administrative and judicial remedies before bringing a Section 1983 action challenging the constitutionality of a property tax assessment procedure in state court.

One may also argue that, according to U.S. Supreme Court precedent, this court cannot require exhaustion of state statutory remedies. If an exhaustion requirement were imposed on the taxpayers, then, like Felder, the state has a procedure that places conditions on the vindication of a federal right in state court. This is so even though the state's statutory scheme does not eliminate a claimant's right to seek full compensation through suit. Further, we are mindful that the taxpayers' case has another aspect that was not present in Felder, which is that exhaustion of state administrative and judicial remedies in the taxpayers' case may entail the additional expense and delay typically associated with

---

Persons Act of 1980, 94 Stat. 353, 42 U.S.C. § 1997e. In Felder, the Court stated that congress, in enacting this statute, expressly recognized that it was working a change in the law. 487 U.S. at 149, 108 S. Ct. at 2312, 101 L.Ed. at 144.

state statutory remedies without according the taxpayers the relief sought. *See Borough of Greentree v. Board of Property Assessment, Appeals and Review of Allegheny County*, 459 Pa. 268, 328 A.2d 819 (1974).[14]

Here, the record reflects that the taxpayers have exhausted state administrative procedures and, without pursuing their state judicial remedies, seek to maintain a Section 1983 class action. In this case, Felder and Howlett command the Court of Common Pleas of Berks County to exercise jurisdiction over a Section 1983 action without requiring the complete exhaustion of state statutory remedies. While exhaustion of state statutory remedies is required in federal courts, exhaustion is not required in the courts of this state insofar as the action is a class action challenging the constitutionality of a system of property tax assessment. This is so because the principle of comity that causes a federal court to refrain from exercising jurisdiction over Section 1983 tax assessment cases has no relevance to a class action challenging, in state court, the constitutionality of a system of property tax assessment.

This creates the anomalous situation that plaintiffs have quicker access to state courts with respect to these types of Section 1983 class actions than to the federal courts. This result does not appear to conflict with any U.S. Supreme Court decision because the vindication of a federal right is not shackled by state rules of judicial administration. This resolution also does not appear to conflict with precedent of this Court. *See Borough of Greentree, supra.* Further, this resolution will not, as local governments contend, disrupt state and local tax administration because, as the taxpayers argue, constitutional challenges such as the

---

[14]In Greentree, this Court ruled that courts of common pleas have equitable jurisdiction to hear cases charging that the Assessment Act provision permitting triennial assessments violated the uniformity clause of the State Constitution and the equal protection clause of the Federal Constitution, where the statutory appeal procedure appearing in the Assessment Act would be of little, if any, utility in determining constitutionality of the provision and where any benefit derived from filing individual appeals with the county board of property assessment would be far outweighed by the inconvenience, delay and expense involved.

taxpayers' class-action challenge probably will, in the long run, significantly reduce the inconvenience, inefficiency, delay and expense involved in countless individual lawsuits over the same issue in many different administrative and judicial forums.[15]

On the other hand, if we were to refuse access to the courts before exhaustion of statutory remedies with respect to this type of class action, such refusal would conflict directly with U.S. Supreme Court directives. Therefore, we hold that where plaintiffs are a class of the taxpayers challenging the constitutionality of the system by which property tax assessments are made, they can maintain their Section 1983 suit in common pleas court without first exhausting their statutory remedies.[16] The Court of Common Pleas of Berks County properly determined that it had subject matter jurisdiction in this case and this matter is remanded to Commonwealth Court with direction to address the local governments' contentions contained in their appeal at 625 C.D. 1991.

Order of the Commonwealth Court reversed, and case remanded.

Mr. Justice Larsen did not participate in the decision of this case.

Mr. Justice Montemuro files a concurring opinion.

---

[15]The local governments, on page 27 of their brief, state that because taxpayers do not press the issue on appeal, it is "undisputed that they can secure consideration of the constitutional objections before the board of assessment appeals and through de novo review in the court of common pleas." The local governments, however, argue the point no further, perhaps in recognition that the likelihood that the issue would be fully addressed, on the administrative side, by the very people who depend on the continued existence of the present scheme of things is quite small indeed.

[16]We wait for another day to address the issue of whether an individual plaintiff, as opposed to a class of plaintiffs, can maintain a section 1983 action in common pleas court without exhausting state statutory remedies where the challenge is to an individual assessment and not a challenge to the entire system of property tax assessment.

Mr. Justice Cappy files a dissenting opinion.

CONCURRING OPINION

MR. JUSTICE MONTEMURO

By implication, the majority acknowledges that our courts have an obligation to entertain a 1983 challenge to a state tax despite the existence of a statutory remedy. Because I believe that our courts have always had such an obligation, I join the Opinion of the Court.

DISSENTING OPINION

MR. JUSTICE CAPPY

I respectfully dissent from the majority's holding that the Appellant class of taxpayers, who seek to challenge the constitutionality of the property tax assessment system, may maintain their action under 42 U.S.C. § 1983 in common pleas court without first exhausting their state statutory remedies. Although I do not disagree with the majority's background summary of the relevant law, I differ with the majority's resolution of the "apparent conflict" in the United States Supreme Court's "competing lines of cases." (Majority opinion at 12.)

First, it must be remembered that section 1983 creates a federal cause of action. The Supreme Court in *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 102 S. Ct. 177, 70 L.Ed. 2d 271 (1981), specifically held that this federal action requires exhaustion of state administrative and judicial remedies due to the sensitive nature of state tax issues. It makes no sense to undercut the Court's interpretation of federal law. Further, I believe that interests of comity[17] dictate that state courts defer to the federal framework carefully established by the United States

---

[17]It is important to remember that comity works both ways. Judicial comity is "the principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect." BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

Supreme Court, just as the federal court in *Fair Assessment* deferred to the state courts in fashioning a rule that would not disrupt a carefully fashioned state tax scheme. The majority's approach creates the anomalous result of encouraging federal claimants to flock to state courts to pursue section 1983 actions, when the precise purpose of the federal rule is to ensure that state courts may deal with the matter under state law first.

Moreover, the majority's approach virtually eliminates any opportunity for the state courts to examine the state tax scheme under the laws or Constitution of the Commonwealth. The precise concern for the sensitive nature of state tax schemes, which motivated the United States Supreme Court in *Fair Assessment*, should a fortiori motivate state courts to examine those schemes under state law first. The majority's approach obliterates this opportunity and, again, produces the incongruous result of creating a stronger, virtually exclusive federal forum for section 1983 claims in state court — rather than in federal court where the action should take priority.

The Supreme Court's decision in *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L.Ed. 2d 123 (1988), in no way compels the majority's result. It must be remembered that for the state courts to require exhaustion of state remedies as a prerequisite to a section 1983 action would only be to impose upon plaintiffs in state court the same requirement that would be imposed upon them in federal court. Felder simply prohibits the application of a state rule where the rule conflicts with the remedial objectives of section 1983 and its enforcement will "frequently and predictably produce different outcomes in Section 1983 litigation based solely on whether the claim is asserted in state or federal court." 487 US. at 138. Ironically the majority's refusal to impose an exhaustion requirement creates just such a situation where different outcomes will be reached in section 1983 litigation "based solely on whether the claim is asserted in state or federal court."

I believe that, in the circumstances of this case, the Court should defer to the framework established by the federal courts. Therefore, I must respectfully dissent.